No. 10748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN CULJAK and JOSEPH ZELKO, co-partners in business under the firm name and style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, CONTRACTORS, INC., a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS.

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TABLE OF AUTHORITIES CITED.

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Correction of Appellants' Opening Brief.

Under Point V of appellants' brief at page 39 on the seventh line of the first paragraph after the sub-headings, the statement appears, "Counsel for defendants refused to accept such condition." We respectfully request that this be corrected to read "Counsel for plaintiffs refused to accept such condition."

The error was discovered by us after the copy was in the hands of the printer. We thank counsel for defendants for also pointing out the error.

We deem it proper, in view of certain misstatements and misleading arguments in appellees' brief, briefly to reply thereto.

Interpretation of Contract.

Defendants, throughout, base their argument upon the false premise that the sentence in Article II of the contract of lease: "Other than minor or field repairs shall be made by the Lessor without cost to the Lessee" [R. 7], is the equivalent of saying that all *major* repairs shall be made by the lessor without cost to the lessee. We have heretofore in our opening brief (pp. 31-33) analyzed the language of said Article II. It can easily be seen that a field repair, that is a repair necessitated because of use of the machine in the operations in the field, such as, for example, the breaking of a main shaft, because of undue strain or other cause, might well be a major repair. We have, however, no instance of such major repair involved in this case. Another error in defendants' argument is the assumption that an accumulation of minor repairs, because of their aggregate high cost, constitutes a major repair, although such repairs, thus accumulated, would be minor repairs, if singly done. Defendants rely on their witness Collins (Appellees' Br. p. 11) to support this argument, although it clearly appears from Collins' testimony that what he meant was that the making of accumulated minor repairs would be a major *cost*. He said: "After they put on the 82 new tractor pads and the 102 new links, that portion of the machine would be nearly new, but that doesn't effect the shafts which are liable to be crystallized, when you can't tell, or it might be the gears or pinions that might be worn. *All* those parts—but the biggest cost of the repairing is what we call a *major* repair . . . taking the word 'major,' what I mean is that it is the most *costly* part of the machine." [R. 80.]

Defendants also argue (their brief, p. 11) that the terms "minor repairs" and "field repairs" mean the same thing in the sentence, "All necessary minor *or* field repairs to equipment shall be made by the Lessee without cost to the Lessor," since the disjunctive is used. The written agreement, as we pointed out in our opening brief, was prepared by the defendants and, hence, any ambiguity or uncertainty therein must be construed against defendants. Nothing could be more clear than that the parties themselves understood the language to mean that the defendants were obligated to make not only necessary minor repairs but necessary field repairs. An analysis of the repairs made by the defendants themselves during the operations [R. 24-25] discloses that they replaced numerous single parts at costs, for materials alone, ranging from $60.00 to $15.40 each, whereas, the most costly parts installed by plaintiffs in repairing the machine after its return from defendants, cost only $14.20 each. (See our Op. Br. p. 37.)

While the word "or" is classified in our language as a disjunctive, its use is frequently synonymous with the conjunctive "and," particularly where the sense requires. See Vol. 6, *Words and Phrases, First Series,* pp. 5002 *et seq.,* and *Id.,* Vol. 3, *Second Series,* pp. 757 *et seq.,* wherein numerous authorities are cited.

Defendants also argue (Appellees' Br. p. 11) that the defendants were required to make only *necessary* repairs. But surely, this contemplated that they were to make such repairs as might be necessary to keep the machine in as good condition as when received, ordinary wear and tear excepted. As we understand it, defendants' position is tantamount to contending that if the damaged machine

could be operated at all, no matter how defectively or inefficiently, repairs thereon would not be necessary; or, if the machine could be operated on the particular terrain—open country—in which defendants had been operating it, repairs would not be necessary, although the track pads might get so damaged and indented by running over rocks that the machine could not be operated on paved city streets. Defendants' witness Cavanaugh conveyed this thought when he testified: "It was not necessary to put on new pads to keep the machine running on *our* job." [R. 120.] Presumably, defendants decided the replacing of those pads, during the operations over rocky ground, would be ineffective because the rocks would immediately destroy new pads. Cavanaugh testified: "One time the machine was walked perhaps a mile, not at night. And then, when the job was finished on the west end, the machine was walked back again. Those were the two long walks." Undoubtedly, those two long walks would be sufficient to cause the condition of the track pads which defendants' witness Brownfield described as "in terrible shape." [R. 100.] But it would be most unreasonable to insist that repair of the track pads was not necessary before returning the machine to plaintiffs, whose normal use contemplated running it over and upon paved city streets in excavation of sewer trenches.

There is, of course, no express provision in the contract of lease requiring the defendants to return the machine in the same condition as when received, ordinary wear and tear excepted. The law, however, implies such a provision, unless there is in the contract some clear language relieving the defendants from that duty. But no provision in the contract does this. Article II

of the contract does not abrogate this common law duty. Article II merely provides who shall be obliged to make repairs on the machine while in use by defendants. Necessary minor or field repairs are to be at the expense of the defendants. Other repairs are to be at the expense of plaintiffs. [R. 7.] An instance of the character of repairs chargeable to plaintiffs are those contemplated in Article V of the contract wherein it is stated, "If such equipment is not in sound and workable condition when it arrives at the work site, the rental period therefor shall not begin until such equipment shall have been placed in sound and workable condition at the expense of the Lessor." [R. 8-9.] The repair work to comply with said provision would, of course, be "other than minor or field repairs."

Defendants make no claim that the equipment was not in sound and workable condition upon arrival at the site of the work, nor that plaintiffs were ever called upon to make other than minor or field repairs.

The reasonable interpretation of the contract is that it expressly required the defendants to bear the cost of certain classified repairs during the operations, but this did not relieve them from the common law duty to return the machine in as good condition as when received, ordinary wear and tear excepted. (8 C. J. S., Sec. 27, p. 278.)

Not only is the language of the contract consistent with the common law rule and, indeed, an expression of it, as we have already pointed out, but the undisputed evidence is that the parties to the contract so understood it. See Mr. Cavanaugh's testimony [R. 119-120] and that of the chief witness for the defendant, Collins, who testified that his instructions from the defendant were to ascertain

what was needed to put the machine in "supposedly the same condition as when it left here." [R. 71.] And Brownfield, the defendant witness who was charged with doing the repair work, testified that Mr. Cavanaugh instructed him "to put it in as good a repair as it was when it came down here." [R. 100-1.]

But whether we read into the contract the common law provision, or read only its express terms as to making repairs, the inevitable conclusion must be that the machine should have been returned in a repaired and not in a greatly damaged and unrepaired condition.

The Fallacy of Defendants' Position.

The fallacy of defendants' position below and here is that they consider the needed repairs, though viewed singly might be minor or field, were in the aggregate "major" rather than minor. They are, perhaps subconsciously, influenced by the cost of the repairs as a whole, rather than by the nature of the numerous repair jobs that were done. Convincing themselves that the repair job done by plaintiffs after the return of the machine, was a major one, they then proceed to fit the contract to their major premise and argue that the contract by implication required the plaintiffs to make all major, as distinguished from minor, repairs. This argument forces them to the untenable position of conceding that the work which was necessary to be done on the machine was of major character. Thus we find them admitting on page 11 "it seems quite probable that the machine was in need of other than necessary minor or field repairs which might be called major repairs, as distinguished from minor."

But we know what the repairs were. They were, for

example, the replacement of 82 tractor pads. Defendants' counsel would argue that each one of these 82 pads constituted a major repair job. Indeed they say so. Again on page 11: "The tractor pads, or multipedal slats, as they are sometimes called, were classified by Collins as a major repair job."

Even if Mr. Collins had so testified, it would be an untenable conclusion that the court would ignore; but he never so testified. The purport of his testimony was that, taking the job as a whole, it was major rather than minor. Obviously he was thinking of the cost of the job and of the time needed for its completion. He wouldn't have the right to tell the court that the replacement of each pad or of each link in the chain was a major repair job.

No one could deny the condition of these pads which the witness Brownfield himself said was "terrible" [R. 100], or that at least 102 links had to be replaced. The court below apparently fell into the error of counsel's reasoning as to the meaning of the contract and as to the nature of the repair work.

Defendants charge plaintiffs with attempting to arbitrarily change the lease contract so as to make it read differently from its express language. They charge that the plaintiffs maintain that the contract is ambiguous and that plaintiffs "very arbitrarily argue that the words requiring the defendants to make all necessary minor or field repairs is but another way of saying that the bailee should make all ordinary or incidental repairs and return the bailed machine in the same condition as when received, ordinary wear and tear excepted." "This, indeed," defendants say, "is a very simple method of altering the

terms of a contract so as to completely change the meaning thereof." (Appellees' Br. p. 15.)

Now, let's see how arbitrarily plaintiffs have been in this connection.

As a matter of fact, it was defendants and not plaintiffs who first raised the question of ambiguity in the language of the contract. They put on their witness Dan Cavanaugh, their general superintendent on the job at Fort Huachuca, who had been 20 years in the contracting business and had experience with trenching machines. [R. 117-119.] Defendants' counsel asked this expert witness: "Q. And what is meant by the phrase 'necessary minor or field repairs'?" Whereupon objection was made on behalf of plaintiffs. Discussion and argument ensued, and the court overruled the objection [R. 119], after which the question was repeated, whereupon the witness answered: "A. Minor repairs, as I understand it, are repairs to keep the machine running." Plaintiffs moved to strike the answer, because the meaning of the expression in the trade and not the understanding of the witness should be stated. The motion was granted. Thereupon, defendants' counsel added to the question: "As generally used in the trade what does that expression mean?" [R. 120.]

It can thus be seen that defendants regarded the expression in the contract as ambiguous and as requiring explanation by an expert. Their witness answered. "A. It means to keep the machinery, the equipment running;

the repairs necessary or required to keep the equipment running on the job. Major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or some place outside of the field shop. I think the term field repairs would be the same as minor repairs. It would mean the repairs or work necessary to be done on the machine in the field to keep it running. It was not necessary to put on new pads, repair the pads, to keep the machine running on our job. I regard the making of repairs on the chain links as necessary minor repairs or field repairs." [R. 120.]

Upon being turned over for cross-examination, this witness was asked by plaintiffs the following question: "Q. Now, Mr. Cavanaugh, is it not a fact that you considered those two terms in the contract as requiring you people to do the minor or field repairs and put you under the obligation to put the machine back into condition it was when you got it, ordinary wear and tear excepted?" And, without objection from defendants, he answered, "A. Yes, sir. That is what I considered those terms to mean in effect." [R. 121-122.]

It can thus be seen that plaintiffs' argument upon this matter is not arbitrary, but entirely consistent with evidence which defendants vigorously and against objection introduced.

We respectfully submit that our argument throughout has been consistent with the evidence and not arbitrary. We think this question has otherwise been adequately discussed by us in our opening brief, pages 30 to 38, inclusive.

Condition of the Machine When Received by Defendants.

On page 7 of their brief, defendants state:

> "It is to be expected that the age of a piece of machinery is to be considered in estimating its workable condition, and the fact that it had not been repaired any for ten years also indicates that it would be in need of other than necessary minor or field repairs."

It is true the machine was ten years in the possession of plaintiffs at the time of its lease to the defendants, but the undisputed fact is that during that time, which included the 1930-1940 depression, it was actually in operation only 10 or 11 months in soft soil without rocks. [R. 62.] When not working, it was stored in a galvanized shed, well protected, its tracks resting upon 12-inch planks. [R. 41, 48, 57.] These vital facts are not included in defendants' statement of the case "based upon the entire evidence." Nor is any evidence of any kind cited to support the statement that when the machine was delivered to defendants it was "in need of other than necessary minor or field repairs," or any repairs whatsoever.

Counsels' statement is the more surprising to us in the face of defendants' answer wherein they "admit the allegations of paragraphs I to IV, inclusive," of plaintiffs' complaint [R. 22], paragraph III of which complaint having alleged that at the time the machine was delivered to defendants it "was in a condition to render efficient, economic and continuous service"; also in face of the positive testimony of defendants' own witnesses: that it was "in first class condition throughout" [Collins, R. 81],

that it was "in very good shape at the time it was delivered at the project" [Brownfield, R. 96], and that it was "in very good condition." [Cavanaugh, R. 118.]

We should like to know what could happen to a machine of this character while stored and well cared for for the greater portion of ten years in a well protected shed, that would require "other than necessary minor or field repairs," or any repairs. No witness has been produced to answer that question. Because of defendants' admission, it was not plaintiff's duty to produce such witness. Defendants' witnesses, however, proved conclusively, as above shown, that the machine was in excellent condition when received by defendants.

Condition of Machine When Returned to Plaintiffs.

Defendants state on page 4 of their brief:

> "When the trenching machine was returned to the plaintiffs at Los Angeles it was in as good condition as when it was delivered, except for the pads on the caterpillar treads and except for the fact that there were welded buckets instead of new buckets. [R. 103.]"

This statement in itself is an admission by defendants that the machine was in a damaged and unrepaired condition in so far, at least, as the track pads and the buckets were concerned and conclusively establishes that the court's findings of fact 8 [R. 135] is contrary to and not supported by the evidence. But the above quoted statement, extracted from the testimony of defendants' witness Brownfield, gives only a part of Brownfield's testimony as to the damaged condition of the machine upon its

return to plaintiffs. He also testified that 25 per cent of the links on the excavator chain were in bad shape. [R. 108, 109, 110.]

It is evident that Brownfield's estimate of 25 per cent was ultra conservative. He testified he didn't measure any links and said: "The links may have been off pitch quite a bit, but seemingly, to look at it, I would say that 75% of the chain was in fair shape." We have, thus an admission by this witness produced by defendants, that the track pads were damaged and unrepaired, that the buckets were damaged, and that at least 25 per cent of the excavator links, that is, at least 45 links, were in bad shape.

Defendants also ignore the testimony of their own witness Collins, who, after making an examination of the machine at their request, reported to them, "There were 102 excavating chain links that were bent, drawn out of shape, and worn down to a point where they were dangerous to operate." [R. 75.] Defendants' witnesses, Brownfield and Collins, are not contradicted, in so far as their above quoted statements are concerned by any competent witness in the case, not even by defendants' witness, Snelling, on whose testimony they place so much reliance. Snelling makes no positive statement regarding the condition of the excavator chain links or the multipedal track pads. All he states generally is that "so far as he could see from watching the machine operate, it seemed to be in a reasonably good state of repair" [R. 114], and

this statement is effectively nullified by his subsequent testimony. He was merely a city inspector interested only in seeing that the work was done according to contract. He was not an expert and was frank to state that he couldn't tell whether the machine was efficiently operating or not. He couldn't tell the parts of the machine. [R. 115.] The only reason he gave for his statement that the machine "seemed" to be in reasonably good condition was "because there were no breakdowns." He said he didn't inspect the machine [R. 116] and he finally admitted that there could be a lot wrong with that machine and he would never know about it even if he inspected it. He never looked at the track pads in the machine. [R. 117.]

Snelling's testimony, therefore, does not contradict the competent, positive, direct statements of plaintiffs' witnesses, Culjak and Devine, and of defendants' witnesses, Collins and Brownfield.

There is, therefore, no dispute whatever of the fact that the machine was returned in a damaged and unrepaired condition. The only disagreement between the plaintiffs' and defendants' witnesses is as to the *extent* of the damages to the excavator chain links. Plaintiffs' witnesses testified that practically all the links had to be replaced, although there were 9 or 10 good links, but they testified that to detach these from the various places in the old chain where they were encountered and to provide them with new pins and bushings and then to attach them to the new chain would cost practically as much as 9 or 10 links. Collins confirmed this. It would be repetitious to further discuss this matter which is extensively considered on pages 15 to 21, inclusive, of our opening brief.

Use of Machine by Plaintiffs Before Making Repairs Thereon.

Defendants insist that, because plaintiffs put the machine to work immediately upon its return from Fort Huachuca, it must not have been in need of repairs. But, as already pointed out by us, plaintiffs promptly notified defendants of the damaged condition of the machine, and defendants evidenced an apparent intention to repair it by causing an inspection to be made by Collins.

We shall not here repeat what we previously said on this question at pages 23 to 26, inclusive, of our opening brief. We, therefore, respectively refer to said brief at said pages as our reply to defendants.

Materiality of Rentals Paid.

We are at a loss to understand how the defendants expect to convince anyone that because they paid the rent stipulated in the contract of lease, the owners of the trenching machine should overlook the damaged condition of the machine upon its return and not insist upon their claim for compensation for repairs.

It must be remembered that plaintiffs did not themselves set the rate of rental. That was fixed by defendants' representative. The good faith of the defendants is manifested throughout. They delivered their valuable machine to defendants without a written contract. They permitted defendants to prepare their own contract which they unhesitatingly signed when forwarded to them later for

signature. They accepted the verbal assurance of defendants that their machine would not be used upon work that would be injurious to it. They did not claim compensation for all the damages to which they might be justly entitled. When they first called defendants' attention to the damages, they said: "There are several other things that we will have to repair on said trenching machine to put it in workable condition, but we are overlooking all those things if we are going to get this excavation chain and troweling track." [R. 35-36.] If the defendants had thought that they could make the repairs more cheaply than plaintiffs, they were given that privilege. Although the machine was laid up for repairs from August 28, 1941, to September 16, 1941, only one month's rental for deprivation of its use was asked. The rental fixed by defendants was in fact less than the customary rate. The machine was valued by defendants at $20,000.00. [R. 14.] They would be entitled to demand 10% of this valuation as monthly rent, but they accepted defendants' rate. Having thus acted in what seems to us the maximum of good faith, we cannot see how defendants can resort to the irrelevant argument that because defendants complied with their obligation in one particular, they should be relieved from it in another.

Conclusion.

We wish to emphasize, in conclusion, that we are not asking this Court to weigh the evidence admitted before the trial court and to substitute their own decision for the decision below. We confidently assert that the material findings of fact of the Court are wholly unsupported by any competent evidence. Thus, the matter becomes solely a question of law. The undisputed evidence establishes that the leased machine was returned to the lessors in a very damaged and unrepaired condition, and the undisputed evidence likewise establishes that the defendants failed to fulfill their duty with respect to repairs of the machine while in their possession as lessees.

Dated: August 17, 1944.

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